Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1697

SARAH M. BRYAN, ANNA MAE DEMEO and ELVIRA KISSEL,
on behalf of themselves and all others similarly situated

v.

PITTSBURGH PLATE GLASS COMPANY,

(PPG Industries, Inc.)

and

UNITED GLASS AND CERAMIC WORKERS OF
NORTH AMERICA, AFL-CIO

and

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA,
CREIGHTON LOCAL NO. 12,

(D. C. Civil No. 70-920)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Argued January 15, 1974

Before:

SEITZ, *Chief Judge*, KALODNER and
ALDISERT, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 4, 1974)

Opinion of Court of Appeals

SEITZ, *Chief Judge:*

Appeal is taken here, pursuant to 28 U.S.C. § 1291 (1970), from an order of the district court for the Western District of Pennsylvania approving settlement of a class suit and dismissing the complaint with prejudice. The suit was filed on behalf of women presently or formerly employed at the Pittsburgh Plate Glass Company's Creighton plant. Plaintiffs allege that defendants Pittsburgh Plate Glass Company ("PPG") and the United Glass and Ceramic Workers ("the Union") engaged in sex discrimination violating Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1970).

The factual setting for this suit is not complex. Both before and after the effective date of the Civil Rights Act of 1964, PPG classified jobs at its Creighton plant as available to men only or to women only; no job was open to both men and women. Because men and women were not eligible for the same jobs, separate seniority lists were kept. In the 1940's and 1950's, PPG laid off a great number of its Creighton employees. These employees, however, continued to accrue seniority while on lay-off since the bargaining agreement between PPG and the Union contained no termination provision.

When PPG's Creighton operation experienced a brief upsurge in business, in 1966 and 1967, men were recalled from lay-off and new employees were hired to fill male-only positions. No women were recalled, although had the seniority lists been merged, many women would have been senior to most of the recalled male employees. Complaints filed with the Equal Employment Opportunity Commission (EEOC) resulted in a conciliation agreement pursuant to which PPG merged seniority lists and opened certain jobs

to both men and women. Other jobs remained open to only one sex.

In 1969, PPG and the Union negotiated an agreement covering Creighton employees by which employment rights of employees laid off for more than five years were terminated. This agreement immediately terminated the rights of 452 women, but no men. Sex discrimination charges again were filed with EEOC. EEOC made no final

The appellants, however, contend that the defendants' determination, but issued a "right-to-sue" letter to the complainants. Three women who had filed charges with the EEOC brought suit against PPG and the Union.

The district court found maintenance of a class action proper under Rule 23(b)(2) and (b)(3), and the class was defined as the 452 women initially terminated by the cut-off provision negotiated by defendants. Notice was given to the class, and a number of class members opted out of this litigation. After plaintiffs had completed presentation of their case and defendants had presented a substantial part of theirs, agreement on a settlement was reached. Class members were notified of the proposed settlement's terms and were given the opportunity to voice, and brief, objections. Subsequently, the district court approved the settlement, and 82 objecting plaintiffs appealed.

I.

The district court has considerable discretion in determining whether a settlement is fair and reasonable, and its determination will be reversed only for abuse of discretion. Appellants, objecting plaintiffs, contend that the district judge abused his discretion in approving the settlement here. The first argument advanced to support this contention is that the plaintiffs' case was relatively strong as compared to defendants' and, therefore, that it was clearly

not reasonable to grant plaintiffs a very small percentage of claimed back pay.

Consideration of the merits of the case is one step in determining the likely rewards the class would secure, if any, from prosecuting the litigation to a conclusion. *United Founders Life Insurance Co.* v. *Consumers National Life Insurance Co.*, 447 F.2d 647, 655-56; (7th Cir. 1972); cf. *Protective Committee* v. *Anderson*, 390 U.S. 414, 424-25 (1968). The court, of course, need only evaluate the probable outcome of the litigation and is not required to weigh and decide each contention; further, the probable result at trial must be balanced against the probable costs, in both time and money, of continued litigation. *Id.* With these caveats in mind, we turn to a consideration of the plaintiffs' and defendants' cases.

Plaintiffs would seem to have made out a prima facie case of violation of Title VII's prohibition on sex discrimination. See 42 U.S.C. § 2000e-2(a) & (e) (1970); cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). They have shown a past discriminatory policy and an action having immediate discriminatory impact on employment rights. Because plaintiffs probably would be found to have established a prima facie case of sex discrimination, defendants would bear the burden of justifying their discriminatory conduct. *Muniz* v. *Beto*, 434 F.2d 697, 700 (5th Cir. 1970).

Defendants assert that negotiation of the seniority cutoff provision was not discriminatory. They point out that the provision, although intially terminating rights only of women employees, thereafter terminated the employment rights of numerous male employees. Indeed, continued adherence to this provision is likely to terminate the rights of more men than women. Defendants insist that the ter-

mination provision was instituted to promote PPG's "business purpose" of securing a work force of balanced age. Coupled with a questionable discriminatory effect, this business purpose might well lead the district court to conclude that the negotiation of the seniority cut-off did not constitute discrimination on the basis of sex and, hence, was not an unlawful employment practice.[1] Cf. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796-97 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972).

The appellants, however, contend that the defendants' action becomes discriminatory when viewed in light of PPG's established system of job-classification by sex. Assuming that the legal theory underlying this contention is correct, we note that PPG claims that its job classifications were proper, and to support its claim, PPG has made allegations that appear to satisfy some of the disparate tests for ascertaining a bona fide occupational qualification.[2] See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev., 1109, 1177-81 (1971). As an additional defense, the defendants assert that plaintiffs' suit is barred by failure to file charges with the EEOC within ninety days of the alleged unlawful practice, here

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[1] Defendants also contend that, even if discriminatory, the termination provision is not unlawful because it was required by PPG as a "business necessity." We do not find consideration of this defense necessary.

[2] PPG claims that it can prove that all or substantially all women would be incapable of the repetitive lifting of heavy loads of glass (which, PPG asserts, is a fragile and dangerous matter) required for formerly male-only jobs and that no practicable test exists to isolate individual women, if any, who may be capable of performing such jobs. We note, however, that in 1973 PPG abandoned all job classification by sex.

negotiation and adoption of the seniority cut-off provision.[3] Timely filing with the EEOC has been held a jurisdictional prerequisite to maintenance of a Title VII suit, e.g., *Mickel* v. *South Carolina State Employment Service*, 377 F.2d 239, 242 (4th Cir. 1967), and plaintiffs appear not to have met that prerequisite.

Two final points concerning the probable outcome of trial here are made by defendants. First, while appellants complain that plaintiffs are receiving a small percent of their back pay claim, plaintiffs have failed to indicate how they would substantiate their claim. Second, defendants correctly note that award of back pay is discretionary, and it is not clear that failure to award such relief here, were plaintiffs successful, would constitute an abuse of discretion. See *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 247-50 (3d Cir. 1973). In light of their defenses, we believe there is a strong likelihood that PPG and the Union would not have been held liable to plaintiffs for back pay. We, therefore, reject appellants' contention that, given the likely trial result, the district court abused its discretion in approving the settlement for a low proportion of plaintiffs' asserted loss.

II.

Appellants contend, however, that the district court abused its discretion in approving as fair and reasonable the particular settlement proposed here when more than twenty percent of the class plaintiffs objected. While the proportion of the class opposed to a settlement is one

[3] The time limit for filing charges with the EEOC has been expanded, since the commencement of this suit, from ninety to one hundred eighty days from occurrence of the alleged unlawful practice. See 42 U.S.C. §2000e-5(e) (Supp. II 1972). We assume that this change does not alter the prerequisites for plaintiffs' suit.

factor to be considered in assessing its fairness, see *C. Wright & A. Miller, Federal Practice and Procedure Civil* § 1797 and cases cited n.42 (1972), a settlement is not unfair or unreasonable simply because a large number of class members oppose it. The drafters of Rule 23 chose as a means of protecting the class the requirement that the district court approve the settlement. They did not require rejection of a settlement on objection of a given part of the class.

Rather than asserting that the number of objectors alone makes approval of the settlement improper, appellants argue that the number of objectors coupled with the nature of the right class members seek to vindicate make approval an abuse of discretion. The right to be free from discrimination is a personal right. See *Robinson* v. *Lorillard Corp., supra* at 799. Appellants argue that litigants should not be forced to abandon personal, as opposed to joint, rights without a judicial decision on the merits. The present Rule 23, however, makes no distinction for settlement purposes between class suits formerly called "true" class actions, where the class shares a joint right or liability, and class suits formerly denominated "hybrid" or "spurious," where rights or liabilities are several. Fed. R. Civ. P. 23(c), 23.1, 23.2; see *J. Moore*, 3B *Moore's Federal Practice* Para. 23.80[1] & [2] (2d ed. 1974). Thus, if it is improper to approve a settlement compelling appellants to abandon their claims against defendants, this impropriety must spring from the nature not of personal rights in general but of the specific rights asserted by the class here.

Appellants, as well as the EEOC speaking as amicus curiae, note that actions prosecuted by the Attorney General under Title VII cannot bind the discriminatee as res judicata or collateral estoppel. *Williamson* v. *Bethlehem*

Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972). Since, they argue, class representatives in a Title VII action function as "private attorneys general," such representatives should not be more able to bind unconsenting plaintiffs than the Attorney General. This analogy fails on two grounds. First, the class representatives do not bind dissenting class members; the district court, not the class representatives, must determine that the settlement is fair and reasonable. Second, class suits serve different ends than do public suits. The Attorney General's prosecution of a suit is governed by desire to achieve broad public goals and the need to harmonize public policies that may be in conflict; practical considerations, such as where limited public resources can be concentrated most effectively, may dictate conduct of a suit inimical to the immediate interests of the discriminatee, who presumably seeks full satisfaction of his individual claim regardless of the effect on other cases.

Unlike suit by the Attorney General or even by a "private attorney," who sue to protect public rights, the class action seeks to vindicate the rights of specific individuals, the class members; and unlike the public action, for a class action to be maintained the class representatives must be members of the class, have claims typical of the class and adequately represent the interests of absent class members. Fed. R. Civ. P. 23(a). Further, this action having been classed as a 23(b)(3), as well as (b)(2), class suit, the class members were given the opportunity to opt out of the litigation. It does not seem anomalous to allow a court approved class settlement, but not a suit by the Attorney General, to compromise a discriminatee's Title VII claim.

III.

Although the district court did not abuse its discretion in finding the settlement fair and reasonable, appellants contend that the judgment of the district court must, nonetheless, be reversed. Appellants argue that the district court erred in defining the class broadly for all purposes when the class was clearly divisible into two sub-classes seeking different relief. The more senior class members are presumed by appellants to be interested in securing only back pay, while appellants desire reinstatement as well.

Where some ascertainable characteristic shared by only some members of a class causes them to seek relief not desired by the remaining members, it may be improper to treat the class as unitary. A pertinent illustration is offered by the Seventh Circuit's decision in *Air Line Stewards & Stewardesses Association* v. *American Airlines, Inc.*, Nos. 72-1335, -1336, -1339 & -1503 (7th Cir. December 21, 1973), although the court there focused on whether a proper class representative had been selected. The suit in *Air Line Stewards*, which challenged American Airlines' policy of discharging stewardesses who became pregnant, was originally filed on behalf of presently employed stewardesses who did or might desire to become pregnant and on behalf of stewardesses whose employment was terminated due to pregnancy. Obviously, those still employed by American could have an interest only in revocation of the airline's discharge-for-pregnancy policy, while former employees could assert claims for back pay and reinstatement as well.

No such distinction appears here. All class members are former PPG employees terminated at the same time for the same reason by the same action. No difference among

the plaintiffs appeared until some objected to the settlement; and we cannot assume that objection to the settlement sprang from differences generic to one identifiable group of plaintiffs. We, therefore, reject appellants' contention that the district court erred in refusing to divide the class into sub-classes.

Finally, appellants challenge the sufficiency of the district court's statement of its reasons for approving the settlement and dismissing the suit. It is essential in cases such as this that the district court set forth the reasoning supporting its conclusions in sufficient detail to make meaningful review possible; use of "mere boilerplate" language will not suffice. *Protective Committee* v. *Anderson*, *supra* at 434. Here the district court's opinion meets that requirement: it catalogues the parties' contentions, indicates the court's view of their strengths, and notes additionally the substantial delays likely in ascertaining appropriate back pay, should plaintiffs win such relief. To require a fuller statement of the court's views would turn a decision on approval of a proposed settlement into a determination on the merits in all but name.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of Court of Appeals Denying Motion for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.73-1697

SARAH M. BRYAN, *et al.*, on behalf of themselves and all others similarly situated,

v.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,
OBJECTING PLAINTIFFS, MARIE ABATE, *et al.*,

Appellants.

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
KALODNER, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEISS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Illegible
Judge

Dated: May 7, 1974

Judgment and Mandate

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1697

[SAME TITLE]

(D. C. Civil No. 70-920)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present:

SEITZ, *Chief Judge*
and KALODNER and ALDISERT, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 12, 1973, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:
THOMAS P. QUINN
Clerk

Judgment and Mandate

April 4, 1974

Certified as a true copy and issued in lieu
of a formal mandate on May 15, 1974.

Test: THOMAS P. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Opinion and Order of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-920

RECEIVED

JUN 13 1973

SARAH M. BRYAN, ANNA MAE DEMEO and ELVIRA KISSEL, on behalf of themselves and all others similarly situated,

v.

PITTSBURGH PLATE GLASS COMPANY (PPG Industries, Inc.), and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, and UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, CREIGHTON LOCAL NO. 12.

This is a class action which alleges sex discrimination in hiring and employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000(e), *et seq.* Essentially plaintiffs claim that defendants failed to recall them to work for jobs at Pittsburgh Plate Glass Company's Creighton plant and wrongfully terminated the seniority rights of the female employees who are members of the class.

The original class was composed of 452 members. Notice of the action was sent to the members, and an opportunity to remain or withdraw from the class was provided, as well as an opportunity to obtain personal counsel. After these options were exercised, the class was determined to be comprised of 371 members.

After the filing of defendants' Answers and an extensive period of discovery, the Court commenced a non-jury trial of this proceeding on October 10, 1972, as to liability. After the completion of plaintiffs' case and the presentation of considerable evidence and testimony by defendant, counsel for the parties agreed upon a settlement. Under the terms of this settlement, a fund of $931,724 is to be divided among class members on the basis of the number of months in which each class member worked at the Creighton Plant. This formula has the effect of allocating a proportionately larger share of the settlement fund to those more senior class members who, if the lawsuit were partially or wholly successful, would have been entitled to a proportionately larger back pay award. The settlement also extends pension benefits to 76 class members.

The settlement also provides special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the prosecution of this case and who devoted substantial time and expense on behalf of the class.

Finally, the settlement provides for the payment of counsel fees in the amount of $175,000 to Balzarini, Walsh, Conway & Maurizi, counsel for the plaintiff class, and $26,250 to Neely & Voss, referring counsel, and $1,350 for out-of-pocket legal expenses of plaintiff's counsel. Out of these sums, counsel for plaintiffs will reimburse class members for amounts advanced by them for expenses of the suit.

On January 8, 1973, this Court directed that a notice be sent to all members of the plaintiff class, describing the proposed settlement and informing class members of their right to appeal at a hearing on January 29, 1973, to state objections to the proposed settlement. Such notice was

sent, and a hearing was conducted on January 29, 1973, at which time all persons objecting to the settlement had an opportunity to be heard. This Court then ordered that the question of the propriety of the proposed settlement be briefed by the parties, including counsel for the objecting class members and the Equal Employment Opportunity Commission.

On the basis of the record considered as a whole, including the pleadings, interrogatories and answers thereto, pretrial stipulations of the parties, the evidence and testimony presented at the trial, the testimony at the settlement hearing and the briefs submitted by the parties, it is this Court's conclusion that this settlement is a fair and adequate compromise of plaintiffs' claim and takes proper account of the uncertainties and risks of continued litigation.

In this regard it is well to note that this case involves many complex issues which make liability questionable and subject to conjecture. Just a brief recitation and summary of some of these issues illustrates this complexity. For example, the termination of employment by defendants may well have been based on sound business objectives or bona fide occupational qualifications rather than discrimination; plaintiffs' claims even if valid might be subject to the statute of limitations for failure to timely file an appropriate claim with the Equal Employment Opportunities Commission; and the EEOC, whose expertise must be given great deference by the Court, has determined that the August 14, 1968, agreement between defendant union and defendant company terminating the seniority of the employees laid off more than five years was a bona fide seniority agreement entered without any intention to discriminate against plaintiff class.

Beyond the complexity of the issues presented, the Court must conclude that this settlement is fair, reasonable, and just because of the great deal of time which could be consumed if the action were taken to its final conclusion. Assuming all the legal issues related to liability were resolved favorably to the class, the rights of each member of the class would have to be evaluated separately. This by its very nature would require the services of a special master and could well consume four or five years.

In view of all these factors, the Court deems it appropriate to grant approval to the proposed settlement herein above set forth.

An appropriate Order is entered.

ORDER

And Now, this 12 day of June, 1973, it is hereby Ordered:

1. Defendant PPG Industries, Inc., shall deliver to the law firm of Balzarini, Walsh, Conway & Maurizi, counsel for the plaintiff class, no later than October 1, 1973, separate checks payable to the order of each member of the plaintiff class in the amount indicated in Appendix A to this Order.

2. Defendants will provide those members of plaintiff class listed in Appendix B hereto with a pension as provided in the pension agreement covering employees of the Creighton Plant of PPG Industries, Inc. Those class members with at least 9-9/12ths but less than 10 years of credited service under the pension agreement covering the Creighton Plant will be credited with sufficient additional service to equal ten years, the number of years required

to entitle an employee to a pension. Each class member with 10 or more years of credited service under the pension agreement, including those who will become vested by reason of the foregoing provision, will upon making application on or after attaining age 65 receive a monthly pension equal to the years of credited service multiplied by the normal retirement rate in effect on the date application is filed. If any such class member makes application for a pension between age 60 and age 65, the pension benefit will be actuarially reduced in accordance with the terms of the pension agreement.

3. Defendant PPG Industries, Inc., shall deliver to the law firm of Balzarini, Walsh, Conway & Maurizi, counsel for plaintiff class, no later than October 1, 1973, separate checks in the amounts and payable to the order of those class members indicated in Appendix C hereto, which class members actively pursued this litigation and devoted substantial time and expense on behalf of the plaintiff class.

4. Within a reasonable time after receipt by counsel for the plaintiff class of the settlement awards of individual class members, said counsel shall forward the same to each class member, together with a copy of this Order.

5. Upon delivery of the settlement checks to Balzarini, Walsh, Conway & Maurizi, all defendants shall be released of and from any and all obligations, claims, demands, damages and causes of action which any class member may have arising out of or by reason of her employment with PPG Industries, Inc., or her relationship with defendant Unions and more particularly of and from the claims, disputes and demands which are alleged in and gave rise to

this suit. Defendant PPG Industries, Inc., shall refer to this Order on the checks to be distributed to class members.

6. Defendant PPG Industries, Inc., shall pay $176,350 to Balzarini, Walsh, Conway & Maurizi for counsel fees and expenses and $26,250 to the law firm of Neely & Voss as counsel fees. Balzarini, Walsh, Conway & Maurizi shall reimburse class members for any amounts advanced for the expenses of this litigation.

7. The claims of all class members alleged in and arising out of the complaint in this case are hereby dismissed with prejudice.

WALLACE S. GOURLEY
Senior District Judge

Rule 23, Federal Rules of Civil Procedure

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Rule 23, Federal Rules of Civil Procedure

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a

specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Title VII of the Civil Rights Act of 1964, 42 United States Code, §2000e, *et seq.* (Excerpted)

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [As amended March 24, 1972, P. L. 92-261, Sec. 8.]

• • •

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

• • •

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or pro-

ceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

Certificate of Service

I, ELIZABETH R. RINDSKOPF, certify that I am a member of the bar of this Court and that I am of counsel for petitioners Marie Abate, et al., in the above styled and that I have this day served counsel for all respondents addressed as below by first class air mail, sufficient postage prepaid, by depositing copies of same with the United States Mail:

Joseph Mark Maurizi, Esquire
Balzarini, Walsh, Conway & Maurizi
3303 Grant Building
Pittsburgh, Pennsylvania 15219
Attorney for Plaintiffs-Respondents

Scott S. Zimmerman, Esquire
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Attorney for Defendants-Respondents
&
David Clayman, Esquire
Clayman, Jaffy & Taylor
71 East State Street
Columbus, Ohio 43215
Attorney for Defendants-Respondents

This day of August, 1974.

.....

Elizabeth R. Rindskopf
Of Counsel